SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 533

EDYTHE RICE DYER, *Petitioner*

v.

EDWARD P. MURRAY, as successor trustee under the Will of the late JOHN CASSIDY, JANE MURPHY SULLIVAN, JOHN CASSIDY, BARBARA ANN CASSIDY, ROSELLA MARIE CASSIDY FLYNN, and JOAN CASSIDY STETSON, *Respondents.*

Petition for a writ of certiorari to the Supreme Judicial Court of Maine, sitting as the Law Court.

Edythe Rice Dyer
Petitioner pro se
61 State Street
Bangor, Maine

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v.

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Petition for a writ of certiorari to the Supreme Judicial Court of Maine, sitting as the Law Court.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Judicial Court of Maine, sitting as the Law Court, entered on March 23, 1962, in the case of EDWARD P. MURRAY v. JANE MURPHY SULLIVAN, EDYTHE RICE DYER, JOHN CASSIDY, BARBARA ANN CASSIDY, ROSELLA MARIE CASSIDY FLYNN *and* JOAN CASSIDY STETSON.

OPINIONS BELOW.

On October 14, 1961, the Justice of the Superior Court of Penobscot County, State of Maine entered an order reporting the case to the Supreme Judicial Court of Maine, sitting as the Law Court. This order is unreported. The opinion of the Supreme Judicial Court of Maine sitting as the Law Court was rendered on March 23, 1962, and filed on March 26, 1962. It has not been officially reported, but is unofficially reported at 179 A. 2nd 307. On June 5, 1962, the Supreme Judicial Court of Maine, sitting as a Law Court, denied a petition by the Petitioner for Review of the Law Court decision. This order was filed on June 19, 1962, and has not been reported.

Under the name of *Edward P. Murray, Trustee* v. *Jane Murphy Sullivan et als*, the Superior Court of The State of Maine on July 9, 1962, rendered its decision in accordance with the mandate and order of the Supreme Judicial Court of Maine, sitting as the Law Court. This decision is unreported but that portion of the Superior Court decision involved herein appears at (A-13-15).

On September 17, 1962, Mr. Justice Brennan of the Supreme Court of the United States granted an order extending until October 17, 1962, the time in which the Petitioner would be allowed to file her petition asking that a Writ of Certiorari be issued to the Supreme Judicial Court of Maine.

JURISDICTION.

The order and judgment of the Law Court was made on March 23, 1962, and filed with the office of the Clerk of the Law Court on March 26, 1962. On July 9, 1962, the Superior Court of the State of Maine handed down its judgment in accordance with the mandate and order of the Law Court. On June 19, 1962, the Law Court

entered an order denying a petition on behalf of Edythe Rice Dyer, for review of the Law Court order and judgment of March 23, 1962. On September 17, 1962, Mr. Justice Brennan of the Supreme Court of the United States granted an order extending the time in which the Petitioner could file her petition for certiorari until October 17, 1962. The jurisdiction of this Court is invoked under 28 USC 1257 (3) conferring jurisdiction on this Court over final judgments or decrees rendered by the highest court of the State of Maine, in a proceeding where titles, rights, privileges, or immunities were set up or claimed under the Constitution of the United States.

QUESTIONS PRESENTED.

1. If the testator intended that upon the termination of the trust his estate was to be distributed per stirpes in three equal portions, did the Law Court in interpreting the testator's intent as being a per capita distribution act in so arbitrary and capricious a manner as to deprive the remaindermen under the will of vested property rights without due process of law and of the equal protection of the law in violation of the fourteenth Amendment to the Constitution?

2. Did the Supreme Judicial Court of Maine, sitting as the Law Court, by artificially advancing the date of the testator's death from March 25, 1918, to June 9, 1961, and by interpreting the residuary clause of the will in a manner inconsistent with its prior determination of the testator's intent as expressed in the trust created under the will, act in such an arbitrary and capricious manner as to deprive the remaindermen under the will of due process of law and of the equal protection of the laws in violation of the fourteenth Amendment of the Constitution?

3. By refusing to apply the first sentence of Chapter 170, Sec. 1, Subsec. II of the Revised Statutes of Maine 1954, and by applying the second sentence of the said Chapter 170 when in fact the testator died leaving children, did the Supreme Judicial Court of Maine, sitting as the Law Court, deprive the remaindermen of due process of law and of the equal protection of the laws in violation of the fourteenth Amendment of the Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Amendment XIV

". . . nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Revised Statutes of Maine, 1954, Chap. 170, Sec. 1, Subsec. II.

"II. The remainder of which he dies seized, and if no widow or widower, the whole shall descend in equal shares to his children, and to the lawful issue of a deceased child by right of representation. If no child is living at the time of his death, to all his lineal descendants; equally, if all are of the same degree of kindred; if not, according to the right of representation."

STATEMENT OF THE CASE.

John Cassidy, a highly successful Bangor businessman, made his Will on February 21, 1906. Copies of that Will, of a first Codicil dated May 4, 1910, and of a Second Codicil dated November 3, 1911, were annexed as exhibits to the Bill of Complaint. (R. 8-30) At the

time Mr. Cassidy made his Will, he was 64 years of age, had been a widower since 1894, and had five children then living. All of his children, though adults of ages 23 to 40, were then unmarried and living in John Cassidy's household.

Mr. Cassidy's 1906 Will placed his entire estate, consisting in substantial part in wild lands and other real estate, in trust with his eldest son, James W., and his youngest daughter, Lucy, as Trustees. His eldest son James, who had been in partnership with him since 1890 (R. 53), was to "give exclusively his whole time and attention" to the management of the Cassidy Estate for which he was to receive as compensation $10,000 per year. (R. 14-15, 20-21) No other compensation as Trustees or Executors was to be paid to either James or Lucy, the Testator declaring that he deemed such limitation "to be fairer for the interests of my other children" (R. 21). The Will provided further that during the continuance of the Trust, the Trustees should "provide for the comfortable support and maintenance" of each of his five named children "during the life of each of them, and at the decease of each of them, then to all the lineal descendants together, if any, of each of them," a sum not exceeding $4,000 per year (R. 16), raised to $10,000 per year by the First Codicil. (R. 24) Also each of such named children was given a right to occupy rent-free in the City of Bangor, either "one of my houses" or a house which such child could request the Trustees to acquire in the Trustees' names at a sum not exceeding $5,000; the same single house was available "after the death of each of my said children, for the lineal descendants, if any, of each one of my said children." (R. 17-18) The Trust was to continue until the decease of all five of the Testator's children (R. 8) and thereupon the estate was to be distributed as follows:

> "Upon the termination of this Trust, as aforesaid, namely, after the decease of all of my said five named children, all my estate in whatever form the estate shall then be, shall then vest in and become the property of all of my lineal descendants, if any, then living, in the same manner and in the same proportions as shall then be provided by the then existing laws of the State of Maine for the descent among lineal descendants of intestate property, real and personal." (R. 18)

The above-quoted sentence, which controls the decision of this case, is the first sentence of what may for convenience be termed the "Trust Termination Paragraph." That paragraph was amended and re-published by the First Codicil of May 4, 1910, without, however, making any change in its first sentence as quoted above. The Second Codicil provided a $1,000 annuity for the Testator's sister, Ellen Herlihy, and republished the Will without other change. (R. 29)

The Testator was incapacitated by a stroke for the period from December 1, 1912, to his death in 1918. (R. 58-59) At his death only four of his children were living, his daughter Rosella having previously died leaving one child, Edythe (now Edythe Rice Dyer, the Petitioner herein). Prior to his death another of the Testator's daughters, Mary, had married and had one child, Jane (now Jane Murphy Sullivan, one of the Respondents herein). The Testator's son John F. Cassidy, the father of the other four Respondents herein, was not married until October 20, 1920, (2½ years after the death of the Testator). His four children, who are Respondents herein, were born between August, 1924, and December, 1930.

The four surviving children of the Testator are now all dead, the last, Lucy or Lucile C. O'Brien, having died leaving no issue on June 9, 1961.

On June 26, 1961, Edward P. Murray, as successor trustee under the will of the said John Cassidy, filed a complaint in the Superior Court of Penobscot County, State of Maine. By his complaint, the trustee requested that the Court adjudge to whom and in what proportion he should pay over the remainder of the trust corpus. (R. 7). On October 14, 1961, the matter came on for hearing before the Honorable Abraham M. Rudman, Justice of the Superior Court. Upon an agreed statement of facts and by agreement of the parties, Justice Rudman ordered that the case be reported to the Supreme Judicial Court of Maine, sitting as the Law Court, to render the ultimate decision upon the complaint, the answers, the agreed statement of the case and such of the evidence submitted that day as was legally admissible. (R. 77) (A-1).

The applicable state statute incorporated by reference in the will is R.S. 1954 Ch. 170, Sec. 1, Subsec. II. Said statute is the same as was in existence at the time the will was executed and the date of the Testator's death; said statute provides in part:

> "II. The remainder of which he dies seized, and if no widow or widower, the whole shall descent in equal shares to his children, and the lawful issue of a deceased child by right of representation. If no child is living at the time of his death, to all his lineal descendants; equally, if all are of the same degree of kindred; if not, according to the right of representation."

Prior to this case, the same court in the case of *Cassidy, Guardian* v. *Murray, Trustee*, 144 Maine 326, 328, 68 A 2nd 390, 391 held that "It is the intention of the testator which must prevail in the construction of a will. But that intention must be found from the language of the will read as a whole illumined in cases of doubt by the light of the circumstances surrounding

its making." The court after making this statement went on to hold that the testator had intended and unequivocally provided for a stirpital distribution of the support payments under the trust created by the will. Under the clause setting forth the support payments under the trust the testator defined what he meant by the term lineal descendants to mean the lineal descendants of each of his children as specific groups or classes. (R. 17). Faced with this definition, its prior decisions as to the testator's intention, as shown by the trust clauses, and the decision in *Fisk* v. *Keene*, 35 Maine 349 and *Morton* v. *Barrett*, 22 Maine 257, (where the court held that in laying hold of the testator's true meaning, words occurring more than once in a will shall be presumed to be always used in the same sense, unless the context shows a contrary intention), and the fact that at the time of his death he was survived by four children and two grandchildren, the Law Court arbitrarily advanced the date of the testator's death some forty years and held that the testator intended a per capita rather than a per stirpes distribution of the trust corpus. (A-10).

The first time the case was heard on its merits was before the Supreme Judicial Court of Maine, sitting as the Law Court. This Court is the highest Court in the State of Maine and its decisions cannot be appealed to a higher court within the State. Prior to its decision, the Petitioner could not reasonably have anticipated that the Court would disregard the actual facts of the case and its prior decisions in such a manner as to deprive the Petitioner of her rights under the fourteenth Amendment of the Constitution. While the Constitutional issues were not specifically raised before the Law Court they were of necessity implied from the merits of the case and the proceedings. As the Law Court denied, on July 19, 1962, the Petitioner's petition for review of the Law Court decision, this is the first opportunity she has

had to reasonably specifically raise these issues hereinbefore set forth.

ARGUMENT.

The decision of the Supreme Judicial Court of Maine, sitting as the Law Court, has overturned the law of Maine existing from the date of Maine's entrance into the Union. In so doing the Law Court has cast doubts upon the right of an individual to dispose of his property in a manner consistent with his true intentions and desires. The Law Court has said in effect that it makes no difference what an individual may desire to do in disposing of his estate, the Law Court will make the decision for him even though in so doing the individual's intent may be prostituted and the objects of his bounty deprived of their rights under the Laws of the State and the Constitution of the United States.

Under the terms of his Will, John Cassidy set up a trust to provide for the comfortable support and maintenance of each of his five named children "during the life of each of them, and at the decease of each of them, then to all the lineal descendants together, if any, of each of them." (R. 24). This trust was to continue until the decease of all five children (R. 8) and thereupon the estate was to be distributed to his lineal descendants in the same manner and proportions as provided by the laws of the State of Maine for the descent among lineal descendants of intestate property, real and personal. (R. 18).

The applicable State statute governing the descent of intestate property among lineal descendants is R.S. 1954, Ch. 170, Sec. 1, Subsec. II, and states that where a man dies without widow but survived by children the whole shall descend in equal shares to his children, and the lawful issue of a deceased child by right of representation, and only in the event that there are

no children living at the time of his death shall his property go to all of his lineal descendants on a per capita basis.

There is no question but at the time of his death John Cassidy was survived by four of his children and two granddaughters. (R. 55). Thus the first section of the said Ch. 170, Sec. 1, Subsec. II, is satisfied and should have been applied by the Law Court in making its determination as to whom and in what proportion the trustee should distribute the trust corpus. However, the Law Court refused to so do and ruled that "it would be incongruous to permit the statute to operate as though at least one child were still living." (A-10). Thus while the Testator expressed his intent that his estate be distributed in accordance with the terms of the said statute, and the statute states that where children are living at the time of a man's death his estate is to be distributed per stirpes, the Law Court refused to follow the Testator's and the statute's directive, thereby denying your Petitioner her right of equal protection under the laws and deprived her of her property rights without due process of law as guaranteed by the fourteenth Amendment.

Since the cases of *Fisk* v. *Keene*, 35 Maine 349 and *Morton* v. *Barrett*, 22 Maine 257, it has been the law in Maine that in construing a testator's intent, words occurring more than once in a will shall be presumed to always be used in the same sense, unless the context shows a contrary intention. The Law Court applied this rule of construction in the case of *Cassidy, Guardian* v. *Murray, Trustee*, 144 Maine 326, 328, 68 A 2nd 390, 391. In that case it was held that under the trust created by the Will, the Testator had intended and unequivocally provided for a stirpital distribution of the support payments as he had defined lineal descendants to mean the lineal descendants of each of his children as specific groups. Yet in rendering its decision in the pres-

ent case, the Law Court seems to have not only ignored its own mandates and prior decisions (cited above) but also its decision in *Whorff* v. *Johnson*, 143 Maine 198, 204 where it held that "lineal descendants" means the same thing as "issue." In arriving at its decision the Law Court held that as far as the distribution of the trust corpus was concerned, the Testator intended a per capita distribution rather than stirpial when he used the term "lineal descendants" in reference to the remaindermen. (A-5). Thus the Law Court ruled "lineal descendants" was used by the Testator to designate the family groups comprising the class of beneficiaries under the trust provisions, and used to designate the class of beneficiaries irrespective of family groups under the residuary clause of the Will.

It should be noted in reference to the residuary clause the Testator used the phrase "all of my lineal descendants." (R. 18). The clear meaning of this phrase becomes apparent when read in connection with the contingent bequest to his sister Ellen Herlihy. Under that gift he referred simply to "her lineal descendants" (R. 27) and not "all of her lineal descendants." He did not need to use the word "all" in reference to her lineal descendants as they formed only one group while his own lineal descendants were, in his thinking, divided into family groups headed by each of his children.

In reaching its decision that John Cassidy intended a per capita distribution of the trust corpus, the Law Court relied heavily on the cases of *Lermond* v. *Hyler*, 121 Maine 54, 115A 546 and *Merrill Trust Company* v. *Perkins et al*, 142 Maine 363, 53 A 2nd 260. In those cases the Court held that where the testator provided after the death of the life tenant his property was to pass "to my then heirs," as provided by law (*Lermond* v. *Hyler supra*) and to "those persons to whom it would pass by descent under the Statutes of Maine regulating the descent and distribution of intestate estates" (*Mer-*

rill Trust Company v. *Perkins et al supra*) that the statute should be applied as of the date of death of the life tenant and as though the testator's death had occurred at that time. Yet the holding in those prior cases should not be controlling if the testator had a different intent. The Law Court recognized this when it said "It is the intention of the testator which must prevail in the construction of a will. But that intention must be found from the language of the will read as a whole illumined in cases of doubt by the light of the circumstances surrounding its making." (A-4).

Yet in arriving at its decision the Law Court failed to do that very thing. At the date the Will was executed and up to the date of the Testator's death, the law of Maine had always been and still remains that in reference to the laws of descent or the identification of beneficiaries such words as heirs call for a stirpital distribution of estate assets. *Hopkins* v. *Keazer*, 89 Maine 347; *Fairbanks Appeal*, 104 Maine 333, 71 A 933; *Tucker* v. *Nugent*, 117 Maine 10; *Doherty* v. *Grady*, 105 Maine 36, 72 A 869. These were the decisions the Law Court should have relied on in making its determination of John Cassidy's intent rather than the decisions of *Lermond* v. *Hyler* and *Merrill Trust Company* v. *Perkins et al* (*supra*) as it was those cases decided before the Lermond and Merrill Trust Company cases that the Testator was aware of and not the latter two as they were decided long after his death and could have had no bearing on his intention when the Will was executed.

By its decision the Law Court has placed a premium on the Testator's children being prolific. By ruling that the Testator intended a per capita distribution, the Court has in effect said that John Cassidy favored his children in proportion to the number of offspring they produced. That such was not the case can readily be ascertained from an examination of the family situation during the Testator's lifetime.

The five Cassidy children were far from being a "close" family or one free from serious strife. On the contrary, the children were jealous of their expectable rights to benefit from their father's bounty. Each was ready to fight for equal treatment for himself and his family or "lineal descendants." These facts are shown by events occurring during the Testator's lifetime and immediately following his death. The Record adequately sets forth the facts, without need for comment here, of the legal controversy among the children in 1915 (R. 58), of the hotly litigated will contest in which two of the Testator's children charged a third with "fraud, deceit, and undue influence" (R. 60-61), and of the litigation of charges of embezzling their father's property made by two children against a third (R. 67-74).

The Testator inevitably was fully aware of this underlying family strife at the time he made his Will and Codicils, that is, in the period from February, 1906, through November, 1911. In such circumstances he would anxiously avoid any testamentary provision that by unequal treatment of their respective families would increase the strife among his children during their lifetimes after his death.

Another fact indicates the five Cassidy children's expectation (during the Testator's lifetime) that they, and their respective families after their decease, would be treated on par. Following a controversy within the family, the five children of the Testator agreed formally in writing on March 1, 1915, that each "could draw up to $250 per month, which would be charged on the books of John Cassidy, with interest at 5%." (R. 58). Less than 3 months later Rosella Cassidy Rice died. (R. 55). It is significant that moneys were thereafter paid to Edythe Rice, the only child of the deceased Rosella. These payments to young Edythe averaged approximately $250 per month (the same sum agreed upon for

each child in the March 1, 1915 Agreement) from October, 1915, to March, 1918, when the Testator died. (R. 58-59). The formal written Agreement had no express provision for these payments to the descendants of a deceased child of John Cassidy. However, the Cassidy family in practical fact followed what might be called an "inter vivos per stirpes arrangement." Edythe received what her late mother and each of the Testator's other children could draw under the March 1, 1915, Agreement. Although Jane Murphy Sullivan was then living, she received nothing because her mother, Mary A. Murphy, was living. (R. 59). Despite the fact that Mary Murphy had both herself and her young daughter Jane to support, she received nothing more than that received by the young Edythe Rice alone. Cf. *Stamford Trust Co.* v. *Lockwood*, 98 Conn. 337, 119 Atl. 218, 221 (1922). This shows how deeply ingrained in the Cassidy family thinking was the principle that the 5 stirpes or families should be treated equally.

The Testator was so anxious to have complete parity among his children that he specified the per stirpes distribution irrespective of circumstances which in the abstract one might contend justified a per capita distribution. For example, even though the Trust was almost certain to last for a long time and even though the number of lineal descendants of one or more of the Testator's children might become very numerous, Mr. Cassidy limited each group of his lineal descendants to a single $10,000 per year for support and to a single "one of my houses" in Bangor (or $5,000 to buy one).

An examination of the family situation of the Testator provides further evidence of a general intention by the Testator to treat his lineal descendants in family groups. At the time of the making of the Will, nearly 56 years ago, the Testator's five children were all adults, all unmarried and all living in his household. He knew them, and only them, as definite individuals. It would

be stretching reality and inconsistent with normal human experience to expect the Testator to think beyond his own children to subsequent generations and to think of the members of later generations as individuals, rather than derivatively as the hypothetical descendants of his children.

In keeping with these circumstances at the time of its making, February 21, 1906, the Will had a thorough per stirpes pattern. The Testator did not change the per stirpes form of distribution, but rather reaffirmed and republished it, in the Codicils of 1910 and 1911, despite intervening family disappointments that were to him great. Also, in view of the strife within the family, with each child seeking treatment of equality with each of his brothers and sisters, it was only natural that the Testator should provide for a per stirpes distribution which assured his five children that they and their families would be treated alike.

From the whole Will and from the circumstances, it clearly would have been abhorrent to the Testator for the family of any one of his children to receive more than the family of another of his children. Any such inequality among the families of the Testator's children is utterly inconsistent with everything that can be gathered about his intention from the Will and the circumstances surrounding it.

To arrive at its determination that the second sentence of Ch. 170, Sec. 1, Subsec. II applied, the Law Court had to unnaturally advance the date of the Testator's death some forty-three years from 1918 to 1961. In so doing the Law Court had to make the decision that the Testator did not want to die on the date that he did but wanted to wait until 1961 when all of his children had died. It also had to make the further assumption that John Cassidy did not want to die leaving any children surviving him. Yet prior to the date of his death, there was no indication in any decision by the Law

Court that a man could artificially advance the date of his death to a date long after that when he actually passed away. (i.e. neither the Lermond nor Merrill Trust Company cases were decided until after his death.) Thus the only way it is possible to determine the Testator's true intent as to which sentence of Ch. 170, Sec. 1, Subsec. II he desired to incorporate into his Will is to read the section in question illuminated by light of the facts actually existing at the time of execution and at the date of John Cassidy's death, and the law then in effect as determined by the cases. In so doing we find that at those times, John Cassidy had children and reasonably expected them to survive him (which in fact they did). Thus there being no judicial decisions indicating the Law Court would advance the date of a man's death, the only reasonable way to read the statute is to give the words and conditions expressed therein their usual and normal meaning, i.e. a man's property shall descend by right of representation in equal shares to his children and their lawful issue when he dies survived by children. This interpretation of the statute is in strict conformity with the long existing law of the State of Maine and of the United States. For it is axiomatic that where a Will can be read in strict conformity with its terms, the Courts have no authority to resort to artificial means (such as advancing his date of death some 43 years) to effectuate an assumed intent of the Testator. By so doing the Court is not construing the Will of the Testator but is actually writing a new Will for him.

CONCLUSION.

The Court in reaching its decision, that the Testator wanted to have his estate distributed as though he died after the death of his last child and thereby intended a per capita distribution of his estate under the said Ch. 170, Sec. 1, Subsec. II, had to reason in circles.

The Court, after saying that the Testator did not intend for the statute to operate as though at least one child were living, (A-10) went on to say that "To effectuate the Testator's intention as disclosed by this testamentary pattern, the statute must be applied as though the Testator's death occurred immediately after the death of his last surviving child so that the condition that 'no child living' is satisfied." (A-10).

In effect the Court said we assume that the Testator wanted the "no child living" clause of the statute to control, and the Court therefore assumed that he intended to have the actual date of his death advanced by 43 years.

It is unreasonable for the Maine Law Court to apply the intestate descent statute according to the Court's assumption; that Mr. Cassidy intended the distribution to be made, as though he had died after the decease of his last surviving child, AND ("as though" no child was living when he actually did die).

In FACT children were living at the time of his death and the meaning of the statute is based upon (children living or not living at the time of his death.)

Obviously, the intent of the Testator cannot be established by basing an assumption upon an assumption.

Your Petitioner contends that the Law Court ignored its prior decisions governing the construction of wills of this type and that its decision is based upon circular reasoning; that in construing the Will the statute should be applied in such manner as to recognize the admitted fact that the testator was survived by children.

In so doing the Law Court has deprived the Petitioner of her vested property rights without due process of law and has denied her of equal protection of the law, all in

violation of the 14th Amendment to the Constitution of the United States of America.

Respectfully submitted,

EDYTHE RICE DYER
Petitioner pro se
61 State Street
Bangor, Maine
October 15, 1962

APPENDIX.

ORDER.

This Court being of the opinion that this action involves a question of law of sufficient importance and doubt as to justify reporting this action to the Law Court, and the parties having appeared and agreed to such report as shown by their foregoing stipulations,

IT IS ORDERED that this action be reported to the Law Court, which Court shall, upon the Complaint, Answers and Agreed Statement of Facts, and such of the evidence as is legally admissible, render such decision as the rights of the parties require.
Dated October 4, 1961.

/s/ ABRAHAM M. RUDMAN

.....
Justice, Superior Court

OPINION OF THE SUPREME JUDICIAL COURT OF MAINE.

EDWARD P. MURRAY

v.

JANE MURPHY SULLIVAN *et al.*

Decided March 23, 1962

Before WEBBER, TAPLEY, SULLIVAN, DUBORD and SIDDALL, JJ.

WEBBER, Justice.

On report. By his will executed on February 21, 1906, the late John Cassidy first created a trust for the benefit of his five children and their lineal descendants which should endure until the death of the last surviving child. He then disposed of the remainder of his estate in these terms:

"Upon the termination of this trust, as aforesaid, namely, after the decease of all of my said five named children, all my estate in whatever form the estate shall then be, shall then vest in and become the property of all of my lineal descendants, if any, then living, in the same manner and in the same proportions as shall then be provided by the then existing laws of the State of Maine for the descent among lineal descendants of intestate property, real and personal."

The testator died on March 25, 1918, leaving no widow and survived by four of his children, James, Mary, John F. and Lucy, and a grandchild, Edythe Rice Dyer. The latter is the only child of the testator's daughter Rosella who had predeceased her father on May 25, 1915. The trust terminated upon the death of

Lucy on June 9, 1961. The lineal descendants of the testator in the nearest degree then comprised the six grandchildren who are claimants here, the said Edythe Rice Dyer, Jane Murphy Sullivan, only child of Mary, and Roselle M. Flynn, Joan Stetson, Barbara Anne Cassidy and John Cassidy III, the last four being the children of John F. Cassidy.

The applicable statute, incorporated by reference into the will, is R.S. 1954, Ch. 170, Sec. 1, Subsec. II which provides:

"II. The remainder of which he dies seized, and if no widow or widower, the whole shall descend in equal shares to his children, and to the lawful issue of a deceased child by right of representation. If no child is living at the time of his death, to all his lineal descendants; equally, if all are of the same degree of kindred; if not, according to the right of representation."

The parties agree that the six grandchildren are the persons to whom the trustee must distribute the corpus of the estate in the discharge of the responsibilities imposed upon him by the will. They agree that the plaintiff trustee requires the guidance of the court in making final distribution. They disagree only as to the size of the share each claimant should receive. Mrs. Sullivan and Mrs. Dyer, hereinafter called for convenience the proponents, contend that since the testator had children living at his death, the first sentence of the quoted portion of the statute is controlling and that the grandchildren should take as the "lawful issue of a deceased child by right of representation." In short, the two proponents would each take one-third while the four opponents would each taken one-twelfth. The opponents assert that the statute should be applied as of the moment immediately following the death of the last surviving child so that by application of the second sentence of the quoted portion of the statute each grandchild would take *per capita* one-sixth of the remainder.

(1) All parties to this controversy agree upon certain fundamental principles of will construction frequently enunciated in prior decisions of this court. "It is the intention of the testator which must prevail in the construction of a will. But that intention must be found from the language of the will read as a whole illumined in cases of doubt by the light of the circumstances surrounding its making." *Cassidy, Guardian* v. *Murray, Trustee*, 144 Me. 326, 328, 68 A. 2d 390, 391. Since we seldom find an exact duplication in the phraseology of those wills which come before the courts for interpretation, we are not often greatly aided by prior judicial decisions involving the construction of other wills. *New England Trust Co., et al.* v. *Sanger, et al.*, 151 Me. 295, 303, 118 A. 2d 760; *Berman* v. *Shalit*, 152 Me. 266, 268, 128 A. 2d 345. In Maine there is no judicial inclination to prefer either a *per capita* or a *per stirpes* distribution. *Mellen* v. *Mellen*, 148 Me. 153, 159, 90 A. 2d 818. There is further agreement that, whatever the respective shares of the ultimate takers, the remainder did not vest in them until after the death of the testator's last surviving child—such having been provided by the language of the will with great care and particularity.

The proponents vigorously contend that the intention of the testator to follow a *stirpital* testamentary pattern is clearly evidenced by the language of the trust clause providing for support payments for his children and their lineal descendants. This clause provides:

"During the continuance of this Trust, the Trustees of my estate shall provide for the comfortable support and maintenance of each and all of my said five children (naming them), during the life of each of them, and at the decease of each of them, then to all the lineal descendants together, if any, of each of them, a sum, not exceeding for each of them, or all the lineal descendants, if any, of each of them, four thousand dollars (later increased by codicil to ten thousand dollars) per year,

beginning at the time of my decease. And upon the decease of each of my said five children, without leaving any lineal descendants living at the time of the death of each of them, then said payment of a sum not exceeding (ten) thousand dollars per year, as aforesaid, for each year, shall immediately cease."

(2, 3) This clause clearly and unequivocally provided for a *stirpital* distribution of support payments and the will was so construed in *Cassidy, Guardian* v. *Murray, Trustee*, 144 Me. 326, 68 A. 2d 390. There were other provisions of the will which preserved absolute equality among the children and as between living children and the lineal descendants of deceased children until the death of the last surviving child. The proponents find it inconceivable that the testator might "shift gears" and suddenly depart from a pattern of rigid equality among family groups to adopt a pattern of equality among individuals. We do not view such a transition as either surprising or unnatural. The testamentary pattern embraced two distinct phases. In the first phase one or more of the testator's children would in a sense be competing for shares. In such case the testator would be concerned lest any child suffer a diminution of his share in competition with the lineal descendants of deceased children. No such consideration would be involved in the second phase in which no child of his would be living to receive his bounty. We think it most natural and normal that the testator, having discharged his obligation to his children, should view his own lineal descendants of equal degree as a new class standing on a basis of individual equality. In short, we are not persuaded that the pattern which the testator adopted for the first phase of his will was necessarily intended by him to constitute the pattern for his entire will.

When we examine the language employed by the testator in the above quoted support payment clause, we note that a *stirpital* distribution was directed with care

and precision. The annual payments to each child were to be continued "at the decease of each of them, then to all the lineal descendants together, if any, of *each of them*" in an amount "not exceeding for each of them, or all the lineal descendants, if any of *each of them*, (ten) thousand dollars per year."

(Emphasis ours). This language must be compared with that used in the termination clause above quoted in which the testator used the words, "of all of my lineal descendants, if any, then living." It is apparent that although the testator had shown in the support payment clause that he was aware of the language requirements for directing a *stirpital* distribution, no words of similar import appear in the termination clause. This will reflects careful draftsmanship and we view the omission of any clearcut direction of a *stirpital* distribution in the termination clause as significant. See *Mellen* v. *Mellan*, 148 Me. 153, 160, 90 A. 2d 818 (supra). It is contended that the phrase "lineal descendants" had taken on a meaning in the support payment clause which carries over into the termination clause. In the two phases of his testamentary plan the testator had two distinct classes of lineal descendants in mind. In the support payment clause he was providing only for the lineal descendants of those of his children who should die prior to the termination of the trust. If, for example, the last surviving child had left lineal descendants, they would have had no benefit from the trust. Key words in producing this result were as we have noted the italicized "of each of them." In the termination and final distribution phase the testator's concern was for all of his own lineal descendants, a class or group more broadly based and restricted only by the limitations fixed by the incorporated statute. In short the "lineal descendants" provided for in the support payment clause were by no means intended by the tes-

tator to comprise the "lineal descendants" who were to divide the corpus of the estate.

In *Lermond* v. *Hyler*, 121 Me. 54, 115 A 546, the will before the court for construction contained the provision, "and after the death of (a niece) and (a nephew) I give, bequeath and devise all of my property to my then heirs, as provided by law." (Emphasis ours). There were in fact two other persons who were also named as beneficiaries during their respective lives. Upon an analysis of the testamentary plan, the court concluded that the true intent of the testatrix was not precisely expressed by the language employed in the termination clause. The court interpreted the will as though it had provided that after the death of all of the life tenants the remainder should be distributed to those persons who would have been the heirs of the testatrix if she had died immediately after the death of the last surviving life tenant. The court cited with approval *Proctor* v. *Clark*, (1891) 154 Mass. 45, 27 N.E. 673, 12 L.R.A. 721, in which a similar result was reached.

In *White* v. *Underwood*, (1913) 215 Mass. 299, 102 N.E. 426, the will provided that upon the death of the life tenant a trust should terminate and the remainder be distributed "among my heirs at law, according to the statutes which shall then be in force." The court held that the statute should be applied as though the testator had died immediately after the death of the life tenant. A like result was reached in *Welch* v. *Howard*, (1917) 227 Mass. 242, 116 N.E. 492.

Where a trust terminated at the death of a life tenant, the remainder over was to "those persons to whom it would be distributed and to whom it would pass by descent under the statutes of the State of Maine regulating the descent and distribution of intestate estates." The court held that the statute should be applied as of the date of death of the life tenant and implicity as though the testator's death had occurred at that time.

Merrill Trust Co. v. *Perkins, et al*, 142 Me. 363, 53 A. 2d 260. See also Annotation in 30 A. L.R. 2d 406; Restatement of the Law of Property, Sec. 308, Page 1719 et seq.

While conceding that the results in the above cited cases are all correct on their particular facts, the proponents contend that a different conclusion must be reached when, as here, the testator uses the words "lineal descendants" rather than the words "heirs" or "next of kin" or similar words importing death.

In Pennsylvania the court had occasion to consider the same problem. A statute provided that a remainder over after a life estate conditioned to vest at the termination of the life estate in the testator's heirs or next of kin or the persons there unto entitled under the intestate laws "or other similar or equivalent phrase" should be construed as passing to the persons qualifying under the statute as of the termination of the life estate and not to the persons qualifying as of the time of the testator's death. The will before the court for construction vested the remainder over at the termination of a life estate "in (the testator's) lineal descendants according to the intestate laws of the state of Pennsylvania." The court held that the language employed in the will constituted a phrase "similar or equivalent" to the specific expressions found in the statute. *In re Bonsall's Estate*, (1927) 288 Pa. 39, 135 A. 724. We are satisfied that whatever rule of construction would have had application if Mr. Cassidy had made his gift over to his heirs or next of kin as of the time of vesting should have made like application where as here he described the ultimate takers as comprising "all of my lineal descendants, if any, *then* living, in the same manner and in the same proportions as shall *then* be provided by the *then* existing laws of the State of Maine *for the descent among lineal descendants* of intestate property, real and personal." (Emphasis ours).

The proponents direct our attention to the fact that in the original will the above quoted portion of the termination clause was followed by this sentence (later revoked by codicil):

"But if at the termination of this Trust, as aforesaid, that is to say after the decease of all of my said five named children, there should not at that time, namely at the decease of the last survivor of my said five named children, be any of my lineal descendants then living, then and in that event, all my said estate shall be divided among those persons that shall then constitute my heirs at law, under the laws of the State of Maine, as they shall then exist for the descent of intestate property, real and personal."

The proponents argue that since this clause alone, appropriately phrased, would under the rule in Lermond have sufficed to effectuate a *per capita* distribution among the lineal descendants of equal degree, the testator must have some definite purpose in mind when he provided first for the lineal descendants and then for his heirs at law. This purpose, they contend, could only have been to provide a *stirpital* distribution among lineal descendants. The proponents would read the phrase in the above quoted portion of the termination clause, "of all of my lineal descendants, if any, then living," as though the testator had said, "of all of my *groups of* lineal descendants, if any, then living." We are struck at the outset by the fact that the testator did not use the words, "groups of" or any other equivalent words even though, as already noted, he had recognized the necessity in the support payment clause of making clear a *stirpital* intention. In our view the testator placed his potential heirs in two categories, lineal heirs and collateral heirs. That by his reference to "heirs" in the last sentence of the original termination clause he meant "collateral heirs" finds some support in the fact that when by codicil he revoked this last sentence,

he substituted a gift over to his sister who was of course a potential collateral heir. The testator, having resorted to the descent statute for the determination of the takers after the death of his children, may have wished to forestall even the remote possibility that the statute might be so changed as to destroy the priority afforded to lineal descendants over collateral heirs. The language of his will would preserve that priority for his lineal descendants even though the statute by some later amendment might not.

We can discover no sound or compelling reason for reaching any different result in the construction of this will than was reached in *Lermond* v. *Hyler*, 121 Me. 54, 115 A. 546 (supra). Certainly Mr. Cassidy did not intend to incorporate by reference portions of the descent statute which would serve no useful purpose in resolving the dilemma for which it was invoked. Since he had called the statute into action to deal with a situation which could only arise after his children had died, it would be incongruous to permit the statute to operate as though at least one child were still living. If on the other hand we apply the rule in Lermond, the second sentence of the quoted portion of the descent statute has logical application. As already noted, the sentence reads, "If no child is living at the time of his death, to all his lineal descendants; equally, if all are of the same degree of kindred; if not, according to the right of representation." To effectuate the testator's intention as disclosed by his testamentary pattern, the statute must be applied as though the testator's death occurred immediately after the death of his last surviving child so that the condition that "no child is living" is satisfied. In support of this conclusion we take note of the fact that the legislature itself in enacting the descent statute was providing for two very different situations. In the first sentence of the quoted portion it established the flow of property in cases where children are competing

for shares or lineal descendants of more remote degree are competing with one or more children. The legislature provided in the second sentence a very different result to obtain when no children are competing and the takers are all lineal descendants of more remote degree. The latter situation is the very one for which the testator was providing when he invoked the statute to fix the shares of his own lineal descendants of more remote degree. We are satisfied that it was the future legislative method of resolving this dilemma which the testator desired and intended to employ and adopt as a part of his testamentary plan. He had already provided his own scheme of distribution where his children were involved and required the aid of no legislative plan in so doing.

Both proponents and opponents vigorously assert that the language of the will is clear and unambiguous and requires no resort to outside circumstances to resolve ambiguities. Since, however, the claimants reach diametrically opposite results in their interpretation of this language, we must assume that the will may in some respects be ambiguous and some examination of the background against which it was conceived may not be amiss. At the time Mr. Cassidy executed his will he had no grandchildren. When he executed his codicil he had but one, the present Jane Murphy Sullivan. The marriage of her mother, the then Mary Cassidy, seems to have evoked a storm of protest and disapproval as a result of which the testator virtually cut himself off from any association with either this daughter or her child. Mr. Cassidy never knew his other grandchildren. We think it most unlikely that the testator ever intended that a grandchild who suffered some loss of his affection because of her mother's disregard of his wishes should receive substantially more of his estate than other grandchildren whose parent had never seemingly incurred such marked parental displeasure. We think that it is normal and natural for a testator to think of

his prospective grandchildren, yet unborn, in terms of individual equality as recipients of his bounty so long as they are not in competition with any child or children of his. The legislature seems to have made the same assumption in establishing its pattern in the second sentence of the quoted statute. We find nothing in the attendant circumstances which would tend to resolve any ambiguity in favor of a *stirpital* distribution among the testator's grandchildren.

We conclude that the net estate should be distributed by the trustee among the six claimants *per capita*.

Case remanded to the Superior Court, for an order for judgment in accordance with this opinion. Costs and reasonable fees to counsel for the trustee and to counsel for the several defendants to be fixed by the sitting justice below and ordered paid by the trustee and charged in his probate account.

WILLIAMSON, C. J., did not sit.

Civil Action, Docket No. 1692

STATE OF MAINE

PENOBSCOT, ss. SUPERIOR COURT

EDWARD P. MURRAY, *Trustee*
Under Will of John Cassidy

vs.

JANE MURPHY SULLIVAN, EDITH RICE DYER,
JOHN CASSIDY, BARBARA ANN CASSIDY,
ROSELLE MARIE CASSIDY FLYNN,
and JOAN CASSIDY STETSON

FINAL DECREE

Due notice of the time and place of hearing having been acknowledged by counsel of record for all of the parties to the Complaint, and it having been found by the Court that such notice was duly given to all of the parties to the Complaint; this cause came on to be heard in accordance with the decision and mandate of the Supreme Judicial Court of Maine in the cause, certified to the Clerk of Courts for the County of Penobscot on March 26, 1962.

IT IS ORDERED, ADJUDGED AND DECREED, THAT

1. The plaintiff's Complaint is sustained, with the costs and expenses of each of the parties to the Complaint, including reasonable counsel fees as hereinafter fixed, to be paid forthwith by Edward P. Murray, the Trustee under the Will of John Cassidy, from the body of the trust.

2. The true construction of the Will of John Cassidy and the codicils thereto is that, upon the decease of the last surviving child of John Cassidy, namely Lucille O'Brien who died June 9, 1961, all of the estate of John Cassidy, in whatever form the estate shall then be, shall vest and has vested in and become the property of the lineal descendants of John Cassidy, namely Jane Murphy Sullivan, Edith Rice Dyer, John Cassidy, Barbara Ann Cassidy, Roselle Marie Cassidy Flynn, and Joan Cassidy Stetson, one-sixth each.

3. Edward P. Murray, as Trustee under the Will of John Cassidy, after the payment of the costs and expenses of the parties to the Complaint, including reasonable counsel fees as hereinafter fixed, and after reservation only of sufficint funds to defray all costs, including taxes, if any, to be incurred in the distribution as hereinafter directed, is directed to pay over and deliver the body of the trust and all accumulation of income thereon, in equal parts, to the lineal descendants of John Cassidy, namely: Jane Murphy Sullivan, Edith Rice Dyer, John Cassidy, Barbara Ann Cassidy, Roselle Marie Cassidy Flynn, and Joan Cassidy Stetson.

5. The Court further orders and decrees that the Clerk of Courts for Penobscot County shall forthwith cause a certificate or abstract of this Final Decree, incorporating therein Paragraphs numbered 2 and 5 of

this Final Decree, to be recorded in the Registry of Deeds of Hancock, Somerset, Penobscot, Piscataquis, Aroostook and Washington Counties in the State of Maine, and Carroll County in the State of New Hampshire, being all counties wherein real property which is subject to the trust is situate, and such certificate shall, upon the recording in the several Registries of Deeds, be final and binding upon all persons as to the division of the interests in the title heretofore held by John Cassidy; and inserting therein that Edward P. Murray of Bangor, Penobscot County, Maine, is the duly appointed and qualified Trustee, authorized to execute deeds, bills of sale, transfers of stocks and bonds, and such other instruments as are necessary to effectually transfer title of the assets of the Estate of John Cassidy remaining in the hands of the Trustee, to the persons entitled thereto according to this Decree.

Dated, at Bangor, Maine, this 9th day of July, 1962.

/s/ JAMES P. ARCHIBALD

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Justice, Superior Court

STATE OF MAINE

Supreme Judicial Court
sitting as a Law Court.
June Term, 1962.

R Petition for Review of Law Court Decision
in
MURRAY VS. SULLIVAN, et als

Consideration having been given to the Petition for Review of the Decision of the Law Court, filed by EDYTHE RICE DYER, one of the defendants in the case of *Murray* vs. *Sullivan, et als*, opinion filed March 26, 1962, it is

ORDERED that said petition be and it hereby is denied.

/s/ WALTER M. TAPLEY, JR.

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For the Full Court
(excepting Chief Justice Williamson
who did not sit on the case.)

Received and filed
June 19, 1962

F. A. Johnson, Clerk Law Court